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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
ASARCO INCORPORATED,)
)
Defendant.)
)

Civil No. CV 98-3-H-CCL

**ASARCO'S BRIEF IN OPPOSITION TO UNITED STATES' MOTION
FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO DISMISS
FOR FAILURE TO JOIN A NECESSARY PARTY OR, IN THE
ALTERNATIVE, TO STAY AND REPLY IN SUPPORT OF ASARCO'S
MOTION TO TERMINATE THE EAST HELENA CAMU TRUST AND TO
DISTRIBUTE REMAINING TRUST PROPERTY**

I. INTRODUCTION

In response to ASARCO LLC's ("ASARCO") Motion to Terminate the East Helena CAMU Trust and to Distribute Remaining Trust Property (Docket No. 9) (the "Motion to Terminate Trust"), United States filed a Cross Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, or in the Alternative, to Dismiss for Failure to Join a Necessary Party Pursuant to Fed. R. Civ. P. 19(a), or in the Alternative, to Stay these Proceedings (Docket No. 20) (the "Cross Motion"). ASARCO hereby respectfully submits this brief in opposition to United States' Cross Motion and in support of its Motion to Terminate Trust. ASARCO opposes the Cross Motion for the following reasons:

- (1) United States' main contention that "the plain purpose of the [East Helena] CAMU Trust is to provide for the *payment of the costs* of [corrective work related to the CAMU]"¹ is belied by the plain language of the East Helena CAMU Trust Agreement, which states that the Trust was established "to provide all or part of ... *financial assurance* for certain of the work at the [East Helena] facility";²
- (2) The Court should terminate the East Helena CAMU Trust in accordance with Montana trust law because ASARCO no longer has an obligation to

¹ United States' Memorandum of Law in Opposition to ASARCO's Motion to Terminate the East Helena CAMU Trust and Distribute Remaining Trust Property and in Support of the United States' Cross Motion for Summary Judgment or, in the Alternative, to Dismiss for Failure to Join a Necessary Party or, in the Alternative, to Stay (Docket No. 18) (hereinafter, the "Cross Motion Memorandum") at 5.

² Ex. B at 1 (East Helena CAMU Trust Agreement (Docket No. 10-3) (the "CAMU Trust Agreement"), second "Whereas" clause at 1).

perform corrective work on the CAMU, obviating the need for a performance guarantee provided by the East Helena CAMU Trust;

- (3) Dismissal of the Motion to Terminate Trust for failure to join a necessary party is not appropriate without affording ASARCO an opportunity to join the trustee of the East Helena CAMU Trust if the Court determines that participation of the trustee is necessary;
- (4) There is no need to stay the proceedings to allow United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court") to interpret the Montana Sites Settlement³ that resolved ASARCO's obligations to implement corrective actions with respect to the CAMU because this Court has concurrent jurisdiction with the Bankruptcy Court over the Montana Sites Settlement.

United States is attempting to create ambiguity in the CAMU Trust Agreement where there simply is none. ASARCO established the East Helena CAMU Trust to comply with the financial assurance requirement imposed by the Consent Decree between ASARCO and the United States Environmental Protection Agency (the "EPA") entered by this Court on April 6, 1998 (the "1998 Consent Decree"). Under the 1998 Consent Decree, ASARCO agreed to perform certain corrective actions at its former East Helena facility, including work on the

³ Ex. A (Consent Decree and Settlement Agreement Regarding the Montana Sites (Docket No. 10-2), *In re ASARCO LLC, et al.*, Case No. 05-21207 (Chapter 11 Jointly Administered), filed in the United States Bankruptcy Court for the Southern District of Texas on March 13, 2009 (Docket No. 10539)).

CAMU.⁴ The funds held by the East Helena CAMU Trust guaranteed that ASARCO would fulfill its cleanup obligations with respect to the CAMU. The Consent Decree and Settlement Agreement Regarding the Montana Sites (the “Montana Sites Settlement”) approved by the Bankruptcy Court and incorporated into the confirmed plan of reorganization for ASARCO (the “Plan”), expressly settled and resolved *all* of ASARCO’s outstanding obligations under the 1998 Consent Decree, necessarily including the tasks remaining with respect to the CAMU – a “specific subset of the cleanup work required by the 1998 Consent Decree.”⁵

When ASARCO paid \$100 million into a custodial trust account for the East Helena Site on December 9, 2009, the effective date of the Plan, its CAMU work obligation was completely satisfied, with *nothing* left to guarantee by continuing the East Helena CAMU Trust. The purpose of the East Helena CAMU Trust is now accomplished, and the Trust should be terminated in accordance with Montana trust law. By filing its Motion to Terminate Trust, ASARCO is simply effectuating the Montana Sites Settlement and bringing this matter to its logical conclusion.

⁴ The term “CAMU” means “corrective action management unit” which is an engineered permanent waste disposal unit.

⁵ Cross Motion Memorandum at 10.

II. UNITED STATES DISTORTS THE PLAIN MEANING OF THE CAMU TRUST AGREEMENT IN AN EFFORT TO AVOID ITS OBLIGATION TO RETURN REMAINING TRUST PROPERTY TO ASARCO

A. The Unambiguous Purpose of the East Helena CAMU Trust Was to Provide Financial Assurance that ASARCO Would Perform Its Cleanup Obligations in Accordance with the 1998 Consent Decree

United States attempts to divert the Court's attention from the real issues at stake by arguing that ASARCO's Motion to Terminate Trust relies on extrinsic parol evidence that fails to show ambiguity in the CAMU Trust Agreement.⁶ Quite to the contrary, ASARCO need not and does not rely on extrinsic evidence because the purpose of the East Helena CAMU Trust (the "CAMU Trust" or the "Trust") is clearly stated on the first page of the CAMU Trust Agreement: the purpose of the Trust was "to provide . . . *financial assurance* for certain of the work at the [East Helena] facility" (emphasis added).⁷ The CAMU Trust Agreement also explains that the CAMU Trust was created to "provide *assurance that funds will be available* when needed for the work required to be conducted by [the 1998] Order." (emphasis added).⁸ In other words, as unambiguously expressed by the CAMU Trust Agreement, ASARCO created the CAMU Trust to

⁶ *Id.* at 4, 12; Cross Motion ¶ 1 at 2.

⁷ Ex. B at 1 (CAMU Trust Agreement, second "Whereas" clause at 1).

⁸ *Id.* at 1.

guarantee that it will perform the corrective work on the CAMU required by the 1998 Consent Decree.

The construction of the Trust purpose advanced by United States – that the CAMU Trust was a fund established to *pay* for the costs of CAMU work⁹ – is not supported by the plain language of the CAMU Trust Agreement. Nor does this construction make sense in view of the fact that the 1998 Consent Decree was not a monetary settlement but an agreement by ASARCO to perform certain cleanup work at the East Helena facility. Instead of addressing the issues raised by ASARCO’s Motion to Terminate Trust, United States digresses into a long and entirely superfluous tutorial on contract interpretation and the use of extrinsic evidence under Montana state law. It is United States, and not ASARCO, that seeks to create an ambiguity where none exists by suggesting that the term “financial assurance” in the CAMU Trust Agreement – a term clearly defined in United States’ own guidance documents – is susceptible to more than one conflicting interpretation.

To counter this disingenuous strategy by United States, ASARCO has offered objective evidence in the form of general guidance on financial assurance issued by the EPA itself and a letter written by the EPA specifically addressing the

⁹ Cross Motion Memorandum at 10.

CAMU Trust¹⁰ to support ASARCO's position that financial assurance – as understood by both parties at the time that the CAMU Trust was established by ASARCO and approved by the EPA – is a means of guaranteeing the performance of a cleanup obligation, not a direct payment for the costs of the cleanup work.

1. EPA Documents Conclusively Establish that the Term “Financial Assurance” as Used in the CAMU Trust Agreement Means “Security” and Not “Payment”

In its Cross Motion Memorandum, United States argues that the Court should disregard certain evidence presented by ASARCO because it is “extrinsic” to the CAMU Trust Agreement.¹¹ This so-called “extrinsic evidence” consists mainly of two EPA documents: (1) EPA's Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action (the “EPA Guidance”),¹² and (2) a letter dated August 9, 2007 from EPA to ASARCO

¹⁰ United States also contends that the Montana Sites Settlement and the 1998 Consent Decree constitute extrinsic evidence that is inadmissible to determine the purpose of the CAMU Trust. Cross Motion Memorandum at 12-14. As discussed below, ASARCO invokes the Montana Sites Settlement not to establish the purpose or intent of the CAMU Trust, but to show that the unambiguous purpose of the Trust has been fulfilled. The 1998 Consent Decree is certainly not extrinsic evidence because it is incorporated by reference into the CAMU Trust Agreement which provides in relevant part that “the United States Environmental Protection Agency ... has entered into a Consent Decree ... on May 5, 1998, with [ASARCO] requiring that [ASARCO] shall provide assurance that funds will be available when needed for the work required to be conducted by that Order.” Ex. B at 1 (CAMU Trust Agreement, first “Whereas” clause at 1).

¹¹ Cross Motion Memorandum at 4, 6-10.

¹² Ex. G (U.S. EPA, Memorandum, Transmittal of Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action, Sept. 30, 2003 (Docket No. 10-8) (the “EPA Guidance”)).

approving the CAMU Trust (the “EPA Letter”).¹³ These documents simply confirm that the term “financial assurance,” as used in the CAMU Trust Agreement to explain the purpose of the Trust, is not susceptible to more than one interpretation and that ASARCO’s understanding of the term is *entirely consistent* with EPA’s understanding, as expressed in the EPA Letter and the EPA Guidance. If United States had not decided to take the absurd position that in this particular case financial assurance means direct payment for corrective work, ASARCO would not need to reference these EPA documents at all.

ASARCO cites to the EPA Letter because it is contemporaneous with the execution of the CAMU Trust Agreement and expresses United States’ understanding of the purpose behind the CAMU Trust. In the EPA Letter, EPA states that “[i]n keeping with the intent behind financial assurance mechanisms ... the funding has to be sufficient so that *if Asarco fails to complete the CAMU*, EPA can take over and complete the work.” (Emphasis added).¹⁴ In its Cross Motion Memorandum, United States concedes that “this sentence does express a key general purpose of financial assurance mechanisms.”¹⁵ In other words, EPA can

¹³ Ex. I (Letter from Sharon Kercher of the EPA to Jon Nickel of ASARCO, dated August 9, 2007 (Docket No. 10-10) (the “EPA Letter”)).

¹⁴ *Id.*

¹⁵ Cross Motion Memorandum at 14.

retain the money in the CAMU Trust *if and only if* ASARCO fails to perform its cleanup obligations. ASARCO did not fail to perform its cleanup obligations. Indeed, United States has recognized and previously represented to this Court that “ASARCO performed obligations under the 1998 Decree until December 9, 2009, when a bankruptcy reorganization plan for ASARCO became effective.”¹⁶ That plan of reorganization incorporated the Montana Sites Settlement which completely resolved, among other things, *all* of ASARCO’s outstanding obligations under the 1998 Consent Decree and provided \$100 million to fund any remaining cleanup work at the East Helena Site in addition to transferring the underlying real estate into a trust for the benefit of United States.

Similarly, the EPA Guidance establishes that under EPA’s own policy, financial assurance is required from owners and operators of RCRA¹⁷ facilities as a way to “demonstrate financial responsibility for corrective action” and to “ensure [that] adequate funds are available to undertake the necessary corrective action at the facility in the event, for example, the facility owners and operators are unable to do so.”¹⁸ That is *exactly* the purpose of the CAMU Trust: to “provide assurance

¹⁶ United States’ Unopposed Motion to Reopen Case for Purposes of Substituting Parties and Modifying the Consent Decree, filed on December 18, 2009 (Docket No. 5) (hereinafter, the “Motion to Reopen Case”) at 4.

¹⁷ RCRA is the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 to 6992.

¹⁸ Ex. G at 4 (EPA Guidance at 4).

that funds will be available when needed for work required to be conducted by the [1998 Consent Decree].”¹⁹ Because United States now contends that the term “financial assurance” means something other than “financial assurance” – *i.e.* “payment” – it is apparently trying to inject ambiguity into the CAMU Trust Agreement. ASARCO can therefore rely on objective evidence such as the EPA Guidance and the EPA Letter to establish something analogous to “custom or usage of the trade” regarding financial assurance in the context of environmental enforcement. *Richards v. JTL Group, Inc.*, 350 Mont. 516, 528 (Mont. 2009) (“objective evidence of ambiguity is evidence that can be supplied by disinterested third parties, such as custom or usage of the trade”).²⁰ That the source of the allegedly extrinsic EPA Guidance on financial assurance is EPA itself only renders this evidence more objective and persuasive.

United States argues that because EPA Guidance does not refer to the CAMU Trust, it “has almost no bearing on the Trust, even if written years earlier by the [EPA].”²¹ That EPA Guidance does not specifically mention the CAMU Trust Agreement is irrelevant – EPA Guidance establishes an official, generally-

¹⁹ Ex. B at 1 (CAMU Trust Agreement, preamble at 1).

²⁰ Montana courts have held that evidence of course of dealing or usage of trade is admissible to explain or supplement the terms of a contract. *Williams Bros. Construction, L.L.C. v. Baltrusch, Inc.*, 2004 ML 3764, 28 (Mont. Dist. Ct. 2004); *Trad Indus. v. Brogan*, 246 Mont. 439, 444 (Mont. 1991).

²¹ Cross Motion Memorandum at 14-15.

applicable definition of the regulatory requirement to provide financial assurance. Because EPA is the federal agency that promulgated and enforces this requirement, its official interpretation of the term “financial assurance” should govern in any dispute. As a regulated entity, ASARCO relied on the EPA Guidance as an authoritative statement on the meaning of the term “financial assurance” when drafting the CAMU Trust Agreement. EPA should be bound by the meaning it attributes to the term “financial assurance” in its own policy documents. Thus, the EPA Guidance most certainly sheds light on the intent of the ASARCO as the Grantor of the CAMU Trust.

Inexplicably, United States now takes the position the term “financial assurance” means something different when applied to the CAMU Trust than its established usage. The conveniently reinvented interpretation of “financial assurance” proffered by United States in its Cross Motion Memorandum – that financial assurance is direct payment for corrective work²² – is precisely the kind of “subjective” evidence of ambiguity – that is “invariably self-serving, inherently difficult to verify and thus, inadmissible” that United States asks this Court to disregard.²³ To the extent the Court determines that the term “financial assurance” is ambiguous, however, the Court should be guided by the definition of financial

²² Cross Motion Memorandum at 5, 10, 19.

²³ *Id.* at 9.

assurance as a *performance guarantee* supplied by United States in its official and publicly available guidance on financial assurance, not by the revised, self-serving definition of financial assurance as *payment* that United States now urges the Court to adopt.

2. ASARCO Created the CAMU Trust as a Performance Guarantee, Not as a Direct Payment for Corrective Work on the CAMU

United States argues that the CAMU Trust simply provided funding for the costs of the corrective work on the CAMU, and that this was a “past payment,” as opposed to the \$100 million provided through the Montana Sites Settlement which United States characterizes as a “future payment” for unspecified “other work.”²⁴ In making this argument, United States seeks to blur the distinction between “payment” and “financial assurance.” Yet, it is clear from the CAMU Trust Agreement that the Trust was created and operated as a financial guarantee that ASARCO would satisfy its cleanup obligations under the 1998 Consent Decree, not as payment to United States for the work. This fact cannot be changed by United States’ repeated references throughout the Cross Motion Memorandum to the financial assurance provided by the CAMU Trust as a “past payment” or a “Fund.”

²⁴ *Id.* at 19, 21, 23.

United States acknowledges that ASARCO created the CAMU Trust to comply with 1998 Consent Decree, which required ASARCO to “establish and maintain financial security to assure completion of its corrective obligations.”²⁵ But United States does not explain how the CAMU Trust could simultaneously operate as financial security and as a direct payment to United States for the corrective work, when it was ASARCO that was doing the work. The CAMU Trust Agreement contemplated that ASARCO itself would perform the cleanup work at its own expense, and that the “Trustee [would] reimburse [ASARCO] ... from the Fund for [its] corrective action expenditures.”²⁶ At no point in time did ASARCO amend the CAMU Trust Agreement to convert it from a financial assurance instrument into a direct payment²⁷ or relinquish its rights to the CAMU Trust property, as United States suggests in its Cross Motion.²⁸

²⁵ *Id.* at 13, citing the 1998 Consent Decree at ¶ 95.

²⁶ Ex. B at 2 (CAMU Trust Agreement, preamble at 2).

²⁷ Cross Motion Memorandum at 5, 10.

²⁸ *Id.* at 3, 21 (describing CAMU Trust funds as “a past payment that was no longer Asarco’s property”).

B. The Purpose of the East Helena CAMU Trust Was Fulfilled When ASARCO Paid \$100 Million into the Montana Custodial Trust Pursuant to the Montana Sites Settlement

1. ASARCO Relies on the Montana Sites Settlement to Show that the Financial Assurance Purpose of the CAMU Trust Has Been Accomplished

United States completely misses the point when it argues that ASARCO uses the Montana Sites Settlement as extrinsic evidence to show ambiguity in the CAMU Trust Agreement.²⁹ Contrary to United States' assertions, ASARCO is not referencing the Montana Sites Settlement to argue that the CAMU Trust Agreement is somehow ambiguous. ASARCO invokes the Montana Sites Settlement solely as proof that the purpose of the CAMU Trust has been fulfilled and that there is no longer a need to maintain financial assurance. The Montana Sites Settlement resolved *all* of ASARCO's outstanding work obligations with respect to its former East Helena facility, necessarily including completion of the CAMU which, as United States correctly explains, is a "specific subset of the cleanup work required by the 1998 Consent Decree[.]"³⁰ The following provisions of the Montana Sites Settlement conclusively demonstrate that ASARCO has no remaining obligations – to maintain financial assurance or otherwise – under the 1998 Consent Decree:

²⁹ *Id.* at 12-13.

³⁰ *Id.* at 10.

- “[A]ll obligations of [ASARCO] to perform work pursuant to the Previous Settlements³¹ are fully resolved and satisfied by this Settlement Agreement.”³²
- All outstanding obligations of ASARCO “under any Consent Decree . . . for the Montana Designated Properties or Montana Sites (including but not limited to obligations to perform)” are “fully resolved and satisfied by this Settlement Agreement.”³³
- The Montana Custodial Trust “shall assume [ASARCO’s] obligations . . . for the East Helena Designated Property . . . [and] [ASARCO’s] obligations under the Montana Consent Decrees.”³⁴

ASARCO’s obligations under the 1998 Consent Decree – including its responsibility to complete work on the CAMU – are clearly within the scope of the release from liability provided by the Montana Sites Settlement. United States’ claims in the ASARCO bankruptcy case for environmental cleanup at the East Helena facility stemmed directly from the 1998 Consent Decree (one of three “Previous Settlements” related to the Montana Sites).³⁵ The Montana Sites Settlement specifically lists Proof of Claim 10746 (asserting liability in connection

³¹ The 1998 Consent Decree is one of three “Previous Settlements” related to several Montana Sites, including the East Helena Site. Ex. A at 2 (Montana Sites Settlement at 2, defining Previous Settlements to include the 1998 Consent Decree).

³² *Id.* § 19 at 45.

³³ *Id.* § 22 at 48.

³⁴ *Id.* § 23 at 49.

³⁵ *Id.* at 4 (stating that United States filed proofs of claim for future response costs and natural resource damages pursuant to Previous Settlements).

with the 1998 Consent Decree) as one of the claims resolved through the Montana Sites Settlement.³⁶ The terms of the Montana Sites Settlement manifest the settling parties' mutual understanding that the Montana Sites Settlement would fully discharge all of ASARCO's remaining obligations under the 1998 Consent Decree.

One of ASARCO's obligations under the 1998 Consent Decree was to maintain financial security as a guarantee that it would perform the required corrective work at the East Helena facility. Once ASARCO paid \$100 million into the Custodial Trust Account for completion of *all* required work at the East Helena facility (including the CAMU), the purpose of the CAMU Trust was entirely fulfilled because there was nothing left to guarantee through a financial assurance mechanism. United States itself has acknowledged that ASARCO is no longer liable for any tasks remaining under the 1998 Consent Decree. In its Motion to Reopen Case filed shortly after the effective date of the Plan, United States confirmed that "[p]ursuant to the terms of the Montana Sites Agreement, ASARCO is no longer liable for any tasks remaining under the 1998 Decree."³⁷ In its Cross Motion Memorandum, United States explains that the work still to be performed on the CAMU such as design and installation of the permanent cap is a

³⁶ *Id.* at 3.

³⁷ Motion to Reopen Case at 4, 6.

“specific subset of the cleanup work required by the 1998 Consent Decree.”³⁸ As such, this work clearly constitutes a “task remaining under the 1998 Decree” for which ASARCO is no longer liable.

Because the Montana Sites Settlement extinguished ASARCO’s performance obligations with respect to the CAMU, maintaining “financial security” through the CAMU Trust “to assure completion of [ASARCO’s] corrective obligations”³⁹ is no longer necessary. Consequently, there is no reason for the CAMU Trust to continue. *See* Montana Trust Code, M.C.A. § 72-33-411(1)(b) (providing that a trust terminates when the trust’s purpose is fulfilled); *Testamentary Trust of Child*, 153 Mont. 349, 358-359 (Mont. 1969) (holding that when a trust’s sole purpose has been fulfilled, the trust should be terminated). Under Montana trust law, the CAMU Trust should be terminated, and the residual trust property should be returned to ASARCO.

2. There Is No Basis for United States’ Position that the CAMU Trust Must Continue until the CAMU Is Completed

United States attempts to persuade the Court that the purpose of the East Helena CAMU Trust is not fulfilled until all work on the CAMU is completed,⁴⁰ apparently forgetting that it now has \$100 million at its disposal to fund such

³⁸ Cross Motion Memorandum at 10.

³⁹ Cross Motion Memorandum at 13, citing the 1998 Consent Decree at ¶ 95.

⁴⁰ *Id.* at 2, 5, 12.

work. As discussed above, the sole purpose of the CAMU Trust was to guarantee that funds would be available for the CAMU corrective action – as long as such funding is available, it does not matter when the CAMU work might be completed. Pursuant to the Montana Sites Settlement, ASARCO has provided \$100 million for completion of the CAMU and other remedial activities at the East Helena Site. It is therefore irrelevant that work on the CAMU has not yet been finished. United States’ “presumption” or “understanding” that it could retain the financial assurance funds remaining in the CAMU Trust⁴¹ even though ASARCO no longer has an obligation to complete work on the CAMU is baseless. United States explains that it had an understanding that the CAMU Trust would continue “because the funds in the Trust were no longer property of Asarco.”⁴² Yet, the CAMU Trust Agreement makes clear that in creating the Trust ASARCO did not simply transfer the Trust funds to EPA; rather, ASARCO received reimbursement from the Trust as it performed the required corrective work⁴³ and at all times was entitled to a refund of any excess funds.⁴⁴ In sum, the funds in the CAMU Trust served as security and were intended to revert back to ASARCO once ASARCO

⁴¹ *Id.* at 3, 21.

⁴² *Id.* at 3.

⁴³ Ex. B at 2 (CAMU Trust Agreement at 2).

⁴⁴ *Id.*

performed its CAMU-related obligations under the 1998 Consent Decree.

ASARCO has never by word or deed relinquished its right to the money it placed in the CAMU Trust.

C. ASARCO and EPA Have Implicitly Terminated the CAMU Trust by Signing the Montana Sites Settlement

United States acknowledges that even in the absence of a written agreement to terminate the CAMU Trust, ASARCO could prove that a constructive or implicit termination has occurred.⁴⁵ The Montana Sites Settlement conclusively demonstrates not only that the purpose of the CAMU Trust has been accomplished, but also that ASARCO and EPA implicitly agreed to terminate the CAMU Trust. The absence of any indication in the Montana Sites Settlement that the CAMU Trust would remain in existence after the consummation of the Montana Sites Settlement, considered together with the \$100 million cap placed on ASARCO's total obligations in connection with the East Helena Site, prove that ASARCO and EPA intended for the CAMU Trust to terminate.

Even if United States entered into the Montana Sites Settlement with the subjective, unilateral presumption that the CAMU Trust would not be disturbed,⁴⁶ such a presumption is neither credible nor dispositive. The *only* trust that is not

⁴⁵ *Id.* at 18.

⁴⁶ Cross Motion Memorandum at 3, 21.

affected by the Montana Sites Settlement (and not subject to the \$100 million funding cap) is the Prepetition ASARCO Environmental Trust – a trust created pursuant to the Consent Decree entered in *United States v. ASARCO Inc., et. al.*, Civil Action No. 02-2079, filed in United States District Court for the District of Arizona. There is no similar exception for the CAMU Trust.

The Montana Sites Settlement expressly limits ASARCO's total financial obligation for the East Helena Site to the \$100 million deposited into the Custodial Trust Cleanup Account for the East Helena Site⁴⁷ and makes no provision that United States is also entitled to keep an additional \$1.2 million financial assurance remaining in the CAMU Trust. In fact, United States affirmed in its Motion to Reopen Case that the Montana Environmental Trust Group, LLC ("METG"), as Trustee of the Montana Environmental Custodial Trust established pursuant to the Montana Sites Settlement, will "complete the work under the 1998 Decree, entered by this Court"⁴⁸ and that METG's obligations under the 1998 Consent Decree "are limited solely to the available cash set aside under the Montana Sites Settlement for the East Helena Designated Property Custodial Trust Cleanup Account and realty resources comprising the East Helena Designated Property."⁴⁹

⁴⁷ Ex. A at 34 (Montana Sites Settlement § 8(h) at 34).

⁴⁸ Motion to Reopen Case at 7.

⁴⁹ *Id.*

If United States entered into the Montana Sites settlement “with the presumption that the Trust would continue”⁵⁰ – an understanding not shared by ASARCO – it was incumbent upon United States to negotiate a special exception for the CAMU Trust in the Montana Sites Settlement, similar to the exception provided for the Prepetition ASARCO Environmental Trust. Yet, United States argues that it was somehow ASARCO’s responsibility to divine United States’ “presumption” and to address it – “[i]f Asarco had wanted to address the CAMU Trust in the Montana Settlement Agreement, or elsewhere, it could have done so.”⁵¹

ASARCO stands by the unambiguous provisions in the Montana Sites Settlement that (1) ASARCO’s total financial obligations with respect to the East Helena Site will not exceed the \$100 million that ASARCO paid for cleanup at the East Helena Site on the effective date of the Plan;⁵² (2) the Montana Sites Settlement is “a *comprehensive settlement of all claims* and causes of action of the [United States and the State of Montana] Governments against [ASARCO] with respect to *all work and past costs and any potential future costs* incurred by the Governments . . . relating to or in connection with the Montana Sites.” (emphasis

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 23.

⁵² Ex. A at 34 (Montana Sites Settlement § 8(h) at 34).

added);⁵³ and (3) the Montana Sites Settlement specifically provides that the *only* trust unaffected by the Settlement is the Prepetition ASARCO Environmental Trust.⁵⁴ Collectively, these provisions mandate one inescapable conclusion – that the CAMU Trust was effectively terminated by the Montana Sites Settlement.

III. ASARCO IS THE ORIGINAL PARTY TO THIS CASE AND HAS STANDING TO SEEK TERMINATION OF THE EAST HELENA CAMU TRUST WHICH IT CREATED

In a footnote, United States challenges ASARCO's standing to bring the Motion to Terminate Trust, explaining that "Asarco is no longer a party to this case" and suggesting that the Court "strike Asarco's motion and require Asarco to file a motion to intervene if it wishes to seek to be heard on this matter."⁵⁵ It is no surprise that United States decided to relegate this "standing" issue to a footnote – the argument is completely devoid of merit. United States' "standing" challenge is based on this Court's order granting United States' unopposed motion to substitute METG, as Trustee of the Montana Environmental Custodial Trust, for ASARCO in this case and in the 1998 Consent Decree pursuant to Federal Rule of Civil Procedure 25(c).⁵⁶ However, United States neglects to mention in its cursory

⁵³ *Id.* at 6-7 (Montana Sites Settlement at 6-7).

⁵⁴ *Id.* at 34, 37 (Montana Settlement Agreement §§ 8(h) and 8(i)(B) at 34, 37).

⁵⁵ Cross Motion Memorandum at 2, n. 4.

⁵⁶ Order Reopening Case for Purposes of Substituting Parties and Modifying Consent Decree, Jan. 8, 2010 (Docket No. 6).

“standing” argument that substitution of parties under Rule 25(c) is merely a procedural device designed to facilitate the conduct of the case, and *does not* alter the substantive rights of the original parties. *Citibank v. Grupo Cupey, Inc.*, 382 F.3d 29, 32-33 (1st Cir. 2004); *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71-72 (3d Cir. 1993); *Collateral Control Corp. v. Deal (In re Covington Grain Co.)*, 638 F.2d 1357, 1361 (5th Cir. 1981). The purpose of Rule 25(c) is simply to allow the action to continue unabated when an interest in the suit changes hands. *Educational Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 207 F.3d 595, 598 (9th Cir. 2000). As such, Rule 25(c) does not deprive the original parties of standing; on the contrary, the merits of the case and the disposition of the property at issue are still determined with respect to the original parties. *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003) (holding that transferee is brought into court solely because it has come to own property in issue, but that the merits of the case are determined vis-à-vis originally named parties).

ASARCO is the original party to this case and the Grantor of the CAMU Trust which it is now seeking to terminate. ASARCO has a right to the residual trust property in the CAMU Trust because it has fully satisfied its performance obligations under the 1998 Consent Decree. While METG has indeed assumed ASARCO’s remaining obligations under the 1998 Consent Decree pursuant to the

Montana Sites Settlement, METG has nothing to do with the CAMU Trust. As the original party to this case, ASARCO has standing to vindicate its substantive right to the residual funds in the CAMU Trust without moving to intervene. Therefore, United States' suggestion that the Court strike ASARCO's Motion to Terminate Trust is without support in law or fact.

IV. EVEN IF THE TRUSTEE OF THE EAST HELENA CAMU TRUST IS A NECESSARY PARTY, DISMISSAL OF THIS ACTION IS NOT AN APPROPRIATE REMEDY

United States asks the Court to dismiss ASARCO's Motion to Terminate Trust for failure to join the Trustee of the CAMU Trust who is a "necessary party to this proceeding" according to United States.⁵⁷ As an initial matter, a trustee is not *per se* a necessary party to a proceeding such as this. *See e.g., Limouze v. M.M. & P. Maritime Advancement, Training, Education & Safety Program*, 397 F. Supp. 784, 791-92 (D.C. Md. 1975) (in ruling on defendant trustees' motion to dismiss for failure of plaintiff to join all the trustees, the Court allowed the case to proceed without all the other trustees).

Setting aside the issue of whether or not the Trustee of the CAMU Trust is a necessary party within the meaning of Rule 19 of the Federal Rules of Civil Procedure, United States is advocating an extreme and unwarranted remedy that has been uniformly rejected by federal courts. The Ninth Circuit has observed that

⁵⁷ Cross Motion at 3; Cross Motion Memorandum at 23-24.

“the philosophy of the present rule [19] is to avoid dismissal whenever possible.”

Walsh v. Centeio, 692 F.2d 1239, 1243 (9th Cir. 1982). Federal courts are “extremely reluctant” to grant motions to dismiss based on nonjoinder, and dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result. *RPR & Assocs. v. O’Brien/Atkins Assocs.*, 921 F. Supp. 1457, 1463 (M.D.N.C. 1995). The proper remedy for failure to join a necessary party is *not* dismissal of the action, but an opportunity to bring in the necessary party by amendment. *Keene v. Hale-Halsell Co.*, 118 F.2d 332, 335 (5th Cir. 1941).

Therefore, even if the Court finds that the Trustee of the CAMU Trust is a necessary party to this trust termination proceeding, the proper remedy is to give ASARCO an opportunity to join the Trustee. In the alternative, Rule 21 of the Federal Rules of Civil Procedure empowers the Court to issue a joinder order directly to the Trustee or to grant leave to ASARCO to add the Trustee. *Health Research Group v. Kennedy*, 82 F.R.D. 21, 29 (D.D.C. 1979). United States fails to cite any legal support for the proposition that the Court can dismiss the action outright because the Trustee has not been joined.

V. THERE IS NO NEED TO STAY THESE PROCEEDINGS AND INVOLVE THE BANKRUPTCY COURT BECAUSE THIS COURT HAS CONCURRENT JURISDICTION OVER THE MONTANA SITES SETTLEMENT

United States “respectfully suggests” that the Court should stay this action and direct the parties to seek guidance from the Bankruptcy Court in determining the meaning of the Montana Sites Settlement.⁵⁸ This “stay” request is completely unnecessary and is nothing more than a delaying tactic, as this Court is just as “familiar with the parties”⁵⁹ as the Bankruptcy Court and has concurrent jurisdiction over the Montana Sites Settlement. First, this Court has been involved with the parties to the present dispute since May 6, 1998 when it approved the 1998 Consent Decree in connection with the East Helena Site.⁶⁰ Second, the Court retains jurisdiction over the 1998 Consent Decree’s implementation and enforcement, and the issues presented here are inextricably linked to the 1998 Consent Decree. Third, the Court has concurrent jurisdiction over the enforcement of the settling parties’ obligations under the Montana Sites Settlement.⁶¹

⁵⁸ Cross Motion Memorandum at 20, 24.

⁵⁹ *Id.* at 20.

⁶⁰ RCRA Consent Decree, Jan. 23, 1998 (Docket No. 1); Order on Consent Decree, May 6, 1998 (Docket No. 4).

⁶¹ Ex. A at 61-62 (Montana Sites Settlement ¶ 46 at 61-62).

This Court is in a better position to construe the Montana Sites Settlement than the Bankruptcy Court because the resolution of ASARCO's Motion to Terminate Trust requires the application of Montana trust law with which this Court is more familiar than the Bankruptcy Court for the Southern District of Texas. The "Choice of Law" clause in the CAMU Trust Agreement provides that the Agreement "shall be administered, construed and enforced according to the laws of the State of Montana."⁶² The provisions of the Montana Sites Settlement relevant to the disposition of the CAMU Trust must be construed in the context of applicable Montana state law on termination of trusts. By requesting an unnecessary stay pending declaration of the Bankruptcy Court, United States is just trying to delay the resolution of ASARCO's request to terminate the CAMU Trust.

VI. UNITED STATES' SUMMARY JUDGMENT MOTION IS A PROCEDURALLY IMPROPER RESPONSE TO ASARCO'S MOTION FOR TERMINATION OF THE CAMU TRUST

The Court should also deny United States' Cross Motion for Summary Judgment because it is a procedurally improper response to ASARCO's Motion to Terminate Trust. ASARCO's Motion to Terminate Trust presents only legal issues

⁶² Ex. B at 4 (CAMU Trust Agreement, § 17 at 4).

of contractual interpretation and does not require any factual development.⁶³ A motion for summary judgment is neither necessary nor appropriate in this context. The purpose of summary adjudication pursuant to Rule 56 of the Federal Rules of Civil Procedure is to determine whether there are any genuine issues of *fact* that warrant proceeding to a trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995) (holding that the test for summary judgment is whether the evidence, when viewed in a light most favorable to the non-moving party, presents genuine issues of material fact).

Here, the facts are not in dispute. The Court is presented with two contracts – the CAMU Trust Agreement and the Montana Sites Settlement – and asked to determine (a) the purpose of the CAMU Trust as expressed in the CAMU Trust Agreement and (b) whether that purpose has been fulfilled by the Montana Sites Settlement. Both ASARCO and United States agree that this determination can be made from within the four corners of the contracts. United States incorrectly posits that the purpose of the CAMU Trust is a question of fact.⁶⁴ Because ascertaining the purpose of the CAMU Trust involves contractual interpretation, it is a legal issue. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.*, 338 Mont. 41, 50 (Mont. 2007) (holding that “[t]he

⁶³ If United States contends that fact discovery is necessary, then its Cross Motion for Summary Judgment is premature.

⁶⁴ United States’ Statement of Undisputed Facts (Docket No. 21) ¶ 6 at 2.

construction and interpretation of a contract is a question of law”). Therefore, the Court should either deny United States’ Cross Motion for Summary Judgment outright or treat it as an opposition to ASARCO’s Motion to Terminate Trust.

VII. CONCLUSION

Because ASARCO has settled all its outstanding work obligations in connection with the East Helena facility, it is no longer bound to maintain financial security to assure completion of its corrective obligations. The CAMU Trust was created in order to comply with the financial assurance requirement imposed by the 1998 Consent Decree. Completion of the corrective work on the CAMU is now guaranteed by the \$100 million that ASARCO paid into the Custodial Trust Account pursuant to the Montana Sites Settlement to fund its remaining work obligations. Therefore, the CAMU Trust no longer serves any purpose, and ASARCO is entitled to a refund of the \$1.2 million remaining in the Trust.

For the foregoing reasons, ASARCO respectfully asks the Court (1) to deny United States’ Cross Motion in its entirety, and (2) to grant ASARCO’s Motion to Terminate the East Helena CAMU Trust.

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Respectfully submitted this 7th day of June, 2010.

By: /s/ Kenneth Lay

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FOR ASARCO INCORPORATED

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I hereby certify that the above **Asarco's Brief In Opposition To United States' Cross Motion For Summary Judgment Or, In The Alternative, To Dismiss For Failure To Join A Necessary Party Or, In The Alternative, To Stay, And Reply In Support Of Asarco's Motion To Terminate The East Helena CAMU Trust And To Distribute Remaining Trust Property** is 6474 words in length, excluding caption and certificates of service and compliance, and is in compliance with L.R. 7.1(d)(2)(A).

Dated: June 7, 2010

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FOR ASARCO INCORPORATED

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010 a copy of the foregoing **Asarco's Brief In Opposition To United States' Cross Motion For Summary Judgment Or, In The Alternative, To Dismiss For Failure To Join A Necessary Party Or, In The Alternative, To Stay, And Reply In Support Of Asarco's Motion To Terminate The East Helena CAMU Trust And To Distribute Remaining Trust Property** was served upon the following persons by the following means:

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